

TENTATIVE RULINGS

FOR: August 25, 2015

Please note that the court will strictly enforce filing deadlines for papers filed in support of and in opposition to law and motion matters, and may exercise its discretion to disregard a late filed paper, pursuant to California Rules of Court, rule 3.1300(d).

When calculating filing deadlines for papers to be filed within a certain number of court days from a hearing date, parties should exclude court holidays and court closure days.

Unlawful Detainer Cases - No tentative ruling will be posted because access to records is not permitted until 60 days after the complaint is filed. Parties **must appear** for all unlawful detainer demurrers, motions to quash, and other matters.

Court Reporting Services - Official court reporters are not provided by the Court in proceedings for which such services are not legally mandated. These proceedings include civil law and motion matters. If counsel wish to have the hearing on their civil law and motion matter reported, they must arrange for a private court reporter of their choosing to be present. The Napa County Bar Association has further information about local private court reporters. Go to <http://napacountybar.org/court-reporting-services/> for further information.

Attorneys or parties should confer with each other to avoid having more than one court reporter present for the same matter.

PROBATE CALENDAR – Hon. Diane Price, Dept. F (Criminal Courts Bldg.- 1111 Third St.)

Estate of Michael Tami

26-61618

PETITION FOR FINAL DISTRIBUTION UPON WAIVER OF ACCOUNTING

TENTATIVE RULING: The Petition is GRANTED, including fees as prayed.

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Conservatorship of Flesher

26-64038

REVIEW HEARING AND ACCOUNTING

TENTATIVE RULING: The court has been informed that the conservatee is deceased. Therefore, the matter is continued to September 23, 2015 at 8:30 am in Dept. F, for a final

accounting and termination of the conservatorship. The clerk is directed to send notice to the parties.

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Estate of Charles B. Huggins

26-66902

PETITION FOR LETTERS OF ADMINISTRATION AND AUTHORIZATION TO
ADMINISTER UNDER THE INDEPENDENT ADMINISTRATION OF ESTATES ACT

APPEARANCE REQUIRED. Counsel to address the status of decedent's spouse. No
waivers of bond using mandatory Judicial Council form DE-142/DE-111(A-3d) are on file.

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In the Matter of Christian Cervantes Sanchez

26-66938

PETITION FOR ORDER AUTHORIZING COMPROMISE OF MINOR'S CLAIM (Pr.C. 3500
et seq.)

APPEARANCE REQUIRED

**CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. F (Criminal
Courts Bldg.-1111 Third St.)**

Barbara Southard, et al. v. Harold I. Moskowitz, et al.

26-61999

MOTION FOR SUMMARY JUDGMENT

TENTATIVE RULING:

On June 8, 2015, defendants Crown Valley Property Management (CVPM), Danielle Gularte, and Kevin Nickerson filed a motion for summary judgment. On August 20, 2015, Gularte entered into a stipulation with plaintiffs Barbara Southard and Jennifer Abernethy. The stipulation states that Gularte withdraws the motion as to her, and that plaintiffs will not oppose the motion as to Nickerson. The Court notes that the agreement not to oppose the motion does not equate to an agreement that summary judgment should be granted or as presented to the Court in the reply that no triable issue of fact exists as to Nickerson. (Reply at pp. 1:25-26, 2:17-18.) The stipulation is silent as to CVPM.

In addition, on August 20, 2015, CVPM and Nickerson (collectively defendants) submitted errata to their notice of motion, separate statement, and memorandum of points and authorities largely in response to procedural issues raised in the opposition. Defendants attempt to gloss over these issues as nothing more than form over substance and clerical errors. (Reply at pp. 2:8, 2:25.) The Court, however, cannot consider the errata because they violate the notice requirements for a motion for summary judgment. (See Code Civ. Proc., § 437c, subd. (a) [requiring that the notice of motion and supporting papers shall be served at least 75-days

before the time appointed for hearingö].) The Court cannot shorten the 75-day notice period required for a motion for summary judgment. (*Robinson v. Woods* (2009) 168 Cal.App.4th 1258, 1268; *McMahon v. Super. Ct.* (2003) 106 Cal.App.4th 112, 115-18.) Defendants cite no authority to support their position. ö[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat [an] issue as waived.ö (*Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1411; see also *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199 [perfunctory assertion unsupported with legal argument or authority deemed without foundation and rejected]; Cal. Rules of Court, rule 3.1113(a)-(b).)

Defendantsø motion for summary judgment is DENIED. Defendants present contradictory information throughout their paperwork. From what the Court could glean from the information proffered, defendants assert the litigation privilege defeats all causes of action without actually linking it to any particular claim. (See Weil & Brown (The Rutter Guide 2014), § 10:94, citing Cal. Rules of Court, rule 3.1350(d) öFor every motion for summary judgment . . . the separate -Statement of Undisputed Material Factsø must separately identify each cause of action, claim, issue of duty or affirmative defense and each supporting -material factø claimed to be without dispute with respect to that cause of action, claim, issue of duty or affirmative defense.ö].) Defendants also only address Nickersonø liability in their memorandum of points and authorities. Defendants present no argument as to why CVPM is entitled to judgment on all claims despite being identified as a moving party in the notice and referenced as one of the parties submitting the separate statement. Defendantsø procedural failures not only deprive the parties of the ability to properly oppose the motion, but it also has inhibited the Courtø ability to evaluate the merits of the motion.

To the extent the undisputed material facts could be reviewed, defendantsø evidence does not support the facts presented. Defendantsø undisputed material fact number 4 states that ö[t]he lease agreement between [plaintiffs] and Defendant Moskowitz specifically identified Harold Moskowitz as the landlord/owner of the Property, and that any notices related to the lease agreement should be directed to him.ö (Sep. St. at p. 2:18-24.) Defendants cite to paragraph 14 of the complaint, paragraph 5 of Nickersonø declaration, page 93:1-8 of Jennifer Abernethyø deposition, and generally (with no pinpoint cite) to the residential lease agreement as support for this fact.

None of this evidence supports the purported undisputed material fact. The complaint is unverified and cannot serve as evidence to support this fact. Even if the complaint was considered evidence of the fact presented, the paragraph referenced has no bearing on the undisputed fact presented to the Court as it does not mention that Harold Moskowitz is the landlord/owner of the property. (See Rho Decl., Ex. A, ¶ 14 öUpon signing the lease, the plaintiffs were told to contact defendant GEORGE W. MOSCOWITE or defendants CROWN for problems with or repairs to and maintenance of the PROPERTY.ö].) Paragraph 5 of Nickersonø declaration references the lease agreement as the basis for his belief that Harold Moskowitz was the landlord/owner of the property. (*Id.*, Ex. C, ¶ 5.) The residential lease agreement, however, identifies the landlord as öCrown Realty PM for Moskowitz.ö (*Id.*, Ex. A at p. 1.) Without more, the lease agreement does not support the fact that Harold Moskowitz was the landlord/owner of the property. Further, the cited portions of Jennifer Abernethyø deposition provide no support whatsoever for the fact proffered. Indeed, the portion of the

transcript submitted appears to be nothing more than an attorney question, not Jennifer Abernethy's answer that may be relied upon as evidence for purposes of this motion. (See *id.*, Ex. D at p. 93:1-8 [Unknown deponent: "Besides preparing the lease and having you sign the lease at the time of the execution for 8500 Steele Canyon Road, did you have any understanding of what Danielle Gularte was going to do in relation to your tenancy after that point?"].)

Thus, the motion for summary judgment must be denied as there remains a triable issue of material fact. (See *Versa Tech., Inc. v. Super. Ct.* (1978) 78 Cal.App.3d 237, 240 [if there is a *single* triable issue of material fact, the motion *must* be denied]; Weil & Brown (The Rutter Guide 2014), § 10:95:1, citing *Nazir v. United Airlines* (2009) 178 Cal.App.4th 243, 290 ["Considerable care must go into drafting the separate statement. . . . Include only those facts [in the separate statement] which are *truly material* to the claims or defenses involved because the separate statement effectively *concedes* the materiality of whatever facts are included. Thus, if a triable issue is raised as to any of the facts in your separate statement, the motion may be denied."].)

Defendants' three evidentiary objections submitted on August 21, 2015, are **OVERRULED** as they are not code-compliant. (See Cal. Rules of Court, rule 3.1354(c) ["A party submitting written objections to evidence must submit with the objections a proposed order."].)

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Robert Hoffman v. Morey Dastgheib

26-65094

MOTION TO STRIKE

TENTATIVE RULING:

The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Counsel is directed to contact the opposing party forthwith and advise the opposing party of Local Rule 2.9 and the Court's tentative ruling procedure. If counsel is unable to contact the opposing party prior to the hearing, counsel shall be available at the hearing, in person or by telephone, in the event opposing counsel appears without following the procedures set forth in Local Rule 2.9.

Defendant Michael Shapourian's motion to strike the punitive damage allegations against him (page 11:1-13 and page 16:5) from the fifth cause of action for maintenance of nuisance in the second amended complaint is **GRANTED WITHOUT LEAVE TO AMEND**. Plaintiff Robert Hoffman does not make any specific allegations of fraud, malice, or oppression against Shapourian in the fifth cause of action to support the prayer for punitive damages for that claim. The allegation is limited to defendant Morey Dastgheib's purported actions. (See Second Amended Compl., ¶ 59.) Hoffman fails to explain how he can cure this defect. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [the burden is on plaintiffs to show in what manner they can amend the complaint, and how that amendment will change the legal effect of the pleading].)

PROBATE CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

The Estate of Gwen J. Sciutto

26-67033

PETITION TO ADMINISTER ESTATE

TENTATIVE RULING: GRANT petition.

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.)

Matthew D. Davis, et al. v. Robert Leary, et al.

26-65089

DEMURRER TO THE SECOND AMENDED COMPLAINT

TENTATIVE RULING: Defendant Karie Leary's unopposed demurrer to the second cause of action for trespass, fourth cause of action for arson, and fifth cause of action for assault on the ground of failure to state sufficient facts is SUSTAINED WITHOUT LEAVE TO AMEND.

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Mary L. Mines, et al. v. Richard B. Lyons, et al.

26-66207

DEMURRER TO THE FIRST AMENDED CROSS-COMPLAINT

TENTATIVE RULING:

The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Counsel is directed to contact the opposing party forthwith and advise the opposing party of Local Rule 2.9 and the Court's tentative ruling procedure. If counsel is unable to contact the opposing party prior to the hearing, counsel shall be available at the hearing, in person or by telephone, in the event opposing counsel appears without following the procedures set forth in Local Rule 2.9.

Plaintiffs/cross-defendants Mary L. Mines, Peter B. Rauenbuehler, and Wild Horse Ridge, LLC's (collectively "cross-defendants") demurrer to the fourth cause of action for promissory fraud on the ground of uncertainty is **OVERRULED**.¹ An uncertainty demurrer must distinctly specify exactly how or why the pleading is uncertain and where such uncertainty appears. (See *Fenton v. Groveland Cmty. Services Dist.* (1982) 135 Cal.App.3d 797, 809.) Cross-defendants make no specific arguments as to why the claim is uncertain. In any event, the cause of action is certain enough to allow cross-defendants to understand the nature of the

¹ The Court has not considered cross-defendants' request for judicial notice contained in their memorandum of points and authorities. (See Cal. Rules of Court, rules 3.1113(l) [requiring a request for judicial notice to be made in a separate document].)

allegations and the theory of liability in order to fashion an appropriate response. (See *Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

Cross-defendants' demurrer to the fourth cause of action for promissory fraud on the ground of failure to state sufficient facts is **OVERRULED**. Cross-defendants aver this claim lacks the requisite reliance element because the agreement was in existence prior to cross-defendants acquiring the property. This averment ignores the allegation in the FACC that cross-defendants promised to honor the terms of the agreement when they purchased the property. (First Amended Compl. (FACC), ¶¶ 9, 28-29.) Defendants/cross-complainants Richard B. Lyons and Sylvia A. Lyons (collectively "cross-complainants") relied on this promise. (*Id.*, ¶ 31.) Cross-defendants additionally contend there are no specific allegations to support the allegation that they never intended to honor the agreement entered into by their predecessors. This contention is inappropriate for purposes of this demurrer since less specificity is required when facts lie more within cross-defendants' knowledge than within cross-complainants' knowledge. (*Comm. on Children's Television, Inc. v. Gen. Foods Corp.* (1983) 35 Cal.3d 197, 217; see *Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 777 [the rule requiring that fraud be pled with particularity "is not always possible in those cases where the specific facts are within the knowledge and control of the defendant, and especially where defendant is a fiduciary"].) Finally, cross-defendants provide the breach of contract allegations cannot form the basis of a fraud claim. Cross-defendants do not cite any authority to support their position. "Parties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat [an] issue as waived." (*Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1411; see also *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199 [perfunctory assertion unsupported with legal argument or authority deemed without foundation and rejected]; Cal. Rules of Court, rule 3.1113(a)-(b).)

Cross-defendants' demurrer to the fifth cause of action for intentional infliction of emotional distress is **OVERRULED**. "Conduct, to be 'outrageous,' must be so extreme as to exceed all bounds of that usually tolerated in a civilized society. While the outrageousness of a defendant's conduct normally presents an issue of fact to be determined by the trier of fact, the court may determine in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." (*Trerice v. Blue Cross of Cal.* (1989) 209 Cal.App.3d 878, 883 [internal citations omitted].) This cause of action is based on cross-defendants' acts when they purportedly engaged in tactics to harass and intimidate cross-complainants to avoid paying a fair share of the water costs. (FACC, ¶ 37.) Such actions could be considered extreme and outrageous conduct. (See *Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1113-14 [elements of a cause of action for intentional infliction of emotional distress].)

Cross-defendants' demurrer to the sixth cause of action for interference with prospective economic advantage is **OVERRULED**. Cross-defendants assert this claim is based on the allegation that they prevented the planned sale of the property and adversely affected its market value "ostensibly by filing the Complaint and Notice of Pendency of Action." (Mem. at p. 8:18-20.) Based on this assertion, cross-defendants believe the Notice of Pendency of Action constitutes a privileged publication under Civil Code section 47, subdivision (b), and cannot serve as the basis for this cause of action. Cross-defendants' assertion lacks merit. As cross-

complainants proffer, the totality of cross-defendants' actions, not just the threat of legal action, have made the sale of the home "difficult and problematic." (FACC, ¶¶ 11, 15, 17-18, 22, 24, 37-38, 40-42.)